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Chew Sam Poh v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–147–05 OF 2013
AZIAH ALI, TENGKU MAIMUN AND ABDUL RAHMAN SEBLI JJCA
16 JANUARY 2015

C

Criminal Law — Dangerous drugs — s 39B(2) — Trafficking — Appeal against conviction and sentence — Accused arrested at a house used as clandestine drug processing laboratory — Accused attempting to avoid arrest by escaping — Whether any doubt on identity of exhibits — Whether judge failed to draw inferences favourable to appellant — Whether presumption of knowledge and presumption of trafficking could be inferred against appellant — Failure to rebut presumptions — Whether conviction and sentence safe — Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), 37(da) & 39B(2)

D

E

Criminal Procedure — Appeal — Hearing of matter not appealed against — Appellant convicted and sentenced in respect of five charges — Appellant only appealing in relation to three charges — No appeal filed against conviction and sentence in respect of fifth charge — Whether appellate court could hear and set aside conviction in respect of fifth charge

F

Evidence — Presumption — Drug trafficking — Double presumption — Abolition of rule against double presumption — Presumption of trafficking triggered by evidence of possession — Presumption of knowledge triggered by proof of custody or control — Whether court must invoke presumption of knowledge under s 37(d) of the Dangerous Drugs Act 1952 once custody or control established — Legal burden of proof on accused to rebut presumptions of knowledge and trafficking — Presumptions to apply independently of each other — Dangerous Drugs Act 1952 ss 37(d), 37(da) & 37A(1)

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H

The complainant Chief Inspector Lim Wei Yih ('SP3') had led a police party to raid a house after receiving a tip off that drug related activities were taking place at the house. On their arrival at the house, SP3 saw the appellant standing in front of the house. When SP3 introduced himself as a policeman, the appellant ran but was caught. Upon unlocking a room using keys which were found on the appellant, SP3 found several containers containing substances suspected to be drug. The drug exhibits were later confirmed to contain morphine weighing 59.39g, methamphetamine weighing 43.23g, ketamine weighing 48.57g, a mixture of heroin and monoacetylmorphines (6.21g of heroin and 1.21g of

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monoacetylmorphines) and cannabis weighing 53.17g. Based on theequipment, the utensils and the substances found in the house, the chemist (SP1) was of the opinion that the house was being used as a clandestine drug processing laboratory which activity fell within the definition of trafficking under s 2 of the Dangerous Drugs Act 1952 ('the DDA'). The appellant was charged with five offences of trafficking in dangerous drugs under s 39B(2) of the DDA. He was found guilty of the first and fifth charges. The fifth charge was amended by the learned trial judge ('judge') to an offence of possession under s 12(2) of the DDA. His appeal against conviction and sentence in respect of the first charge was dismissed by the Court of Appeal. He did not file any appeal against his conviction and sentence in respect of the fifth charge. As for the second, third and fourth charges, the appellant was acquitted and discharged at the close of the prosecution case without his defence being called. Upon the public prosecutor's appeal, the Court of Appeal allowed the appeal whereupon the appellant was ordered to enter his defence on the original trafficking charges. By ordering for the defence to be called, it was taken that the Court of Appeal had found as a matter of law that a prima facie case of trafficking had been established against the appellant in respect of all three charges. The judge found him guilty and sentenced him to death for each of the three charges. The appellant appealed against the conviction and sentence. The appellant contended that: (a) there was a doubt on the identity of the exhibits; (b) the judge had failed to draw inferences favourable to the appellant; and (c) that the fifth charge was baseless as there was no evidence of any seizure by the police of vegetable material suspected to be cannabis. In fact what the chemist found in the bottle marked 6F-21 was 'CECAIR DISYAKI BAHAN ASID'. There was no explanation by the prosecution as to how the 'CECAIR DISYAKI BAHAN ASID' came to be found to be cannabis. The appellant applied for the Court of Appeal to set aside the appellant's conviction on the fifth charge.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) There was no appeal against the conviction in respect of the fifth charge. To allow such application would be to set a dangerous precedent. It will potentially open the floodgates for similar application in the future whereby an appellant could just collaterally attack the trial judge's decision without going through the prescribed appeal process. Although the court was seized with jurisdiction to make the order sought, this was not a fit and proper case for the exercise of such discretionary power. Furthermore it was unfair to the prosecution as the learned DPP was taken by surprise as he was only made aware of the matter on the hearing date itself (see paras 14–15).

(2) When a prima facie case of trafficking has been found to have been established against the accused, the accused bears the following burden: If the presumption of trafficking under s 37(da) of the DDA applies against

him he has a legal burden to prove on the balance of probabilities that the drugs were not for the purpose of trafficking. If the presumption of trafficking does not apply but nevertheless an inference can be drawn that the drugs were for the purpose of trafficking, he still has a burden to discharge but the burden is the lower evidential burden of merely to cast a reasonable doubt in the prosecution case as to whether the drugs were for the purpose of trafficking or otherwise: *Mat v Public Prosecutor* [1963] MLJ 263 referred (see para 18).

(3) Where the burden is to rebut the presumption of trafficking, the consequence of a finding that the presumption has been rebutted will be an acquittal whereas the absence of such a finding will have the consequence of a conviction; *Public Prosecutor v Yuvaraj* [1962] 2 MLJ 189 referred (see para 19).

(4) The defence of no knowledge raised by the appellant was subject to the presumption under s 37(d) of the DDA. In order to succeed he had to discharge this legal burden by proving on the balance of probabilities that he had no knowledge of the drugs. The presumption clearly applied as the drugs were found in the appellant's custody and under his control. He was therefore deemed to have known the nature of the drugs (see para 24).

(5) It is the duty of the court to invoke and give effect to the presumption under s 37(d) of the DDA even where there is evidence from which to draw the inference of knowledge. Parliament in its wisdom has deemed it fit to presume knowledge once custody or control of any dangerous drug has been established. To omit invoking the presumption would be to ignore the intention of the Legislature; *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 referred (see para 26).

(6) The two presumptions apply independently of each other as they relate to different elements of the offence. What is presumed by s 37(da) is the element of trafficking whereas s 37(d) presumes the element of knowledge. While the presumption of trafficking is triggered by evidence of possession, the presumption of knowledge kicks in by proof of custody or control. Whether 'trafficking' is presumed by s 37(da) or inferred by reference to s 2 of the DDA the presumption of knowledge under s 37(d) remains applicable. Either way the burden of proving the defence of no knowledge (if raised) remains with the accused (see paras 28–29).

(7) The judge had rightly rejected the appellant's claim that he had no knowledge of the drugs (see para 34).

(8) The rule against double presumption as decided by *Muhammed bin Hassan* has been overruled by an amendment to the DDA in the form of s 37A(1) which took effect on 15 February 2014 vide Amendment Act A1457. With this amendment, the presumption of knowledge under s

37(d) can now be invoked to presume trafficking under s 37(da). The amendment however does not affect that part of the decision in *Muhammed bin Hassan* which decided that the court must invoke the presumption of knowledge under s 37(d) once custody or control is established (see paras 42–43).

[Bahasa Malaysia summary

Pengadu Ketua Inspektor Lim Wei Yih ('SP3') telah mengetuai pasukan polis untuk menyerbu sebuah rumah selepas menerima maklumat bahawa aktiviti berkaitan dadah sedang berlaku di rumah itu. Setiba mereka di rumah itu, SP3 melihat perayu berdiri di hadapan rumah itu. Apabila SP3 memperkenalkan dirinya sebagai anggota polis, perayu melarikan diri tetapi ditangkap. Setelah membuka sebuah bilik menggunakan kunci yang dijumpai pada perayu, SP3 menjumpai beberapa bekas yang mengandungi bahan yang disyaki dadah. Ekshibit dadah itu kemudian disahkan mengandungi morfin seberat 59.39g, methamphetamine seberat 43.23g, ketamin seberat 48.57g, campuran heroin dan monoacetylmorphines (6.21g heroin dan 1.21g monoacetylmorphines) dan kanabis seberat 53.17g. Berdasarkan peralatan, alat dan bahan yang dijumpai dalam rumah itu, ahli kimia ('SP1') berpendapat bahawa rumah itu digunakan sebagai makmal memproses dadah secara rahsia aktiviti yang mana terangkum dalam definisi pengedaran di bawah s 2 Akta Dadah Berahaya 1952 ('ADB'). Perayu telah dituduh dengan lima kesalahan pengedaran dadah berbahaya di bawah s 39B(2) ADB. Dia didapati bersalah untuk pertuduhan-pertuduhan pertama dan kelima. Pertuduhan kelima telah dipinda oleh hakim perbicaraan yang bijaksana ('hakim') kepada kesalahan milikan di bawah s 12(2) ADB. Rayuannya terhadap sabitan dan hukuman berkaitan pertuduhan pertama telah ditolak oleh Mahkamah Rayuan. Dia tidak memfailkan apa-apa rayuan terhadap sabitan dan hukuman berkaitan pertuduhan kelima. Berhubung pertuduhan-pertuduhan kedua, ketiga dan keempat, perayu telah dilepas dan dibebaskan semasa penutup kes pendakwaan tanpa pembelaannya dipanggil. Atas rayuan pendakwa raya, Mahkamah Rayuan telah membenarkan rayuan di mana perayu perayu diperintahkan untuk memasuki pembelaannya atas pertuduhan-pertuduhan pengedaran yang asal. Dengan memerintahkan pembelaan dipanggil, adalah dianggap bahawa Mahkamah Rayuan telah mendapati sebagai perkara undang-undang bahawa kes prima facie pengedaran telah dibuktikan terhadap perayu berkaitan ketiga-tiga pertuduhan. Hakim mendapatinya bersalah dan menjatuhkan hukuman mati untuk setiap satu daripada tiga pertuduhan itu. Perayu telah merayu terhadap sabitan dan hukuman. Perayu berhujah bahawa: (a) terdapat keraguan tentang identiti ekshibit-ekshibit itu; (b) hakim itu telah gagal membuat inferens yang menyebelahi perayu; dan (c) bahawa pertuduhan kelima tidak berasas kerana tiada keterangan tentang apa-apa rampasan oleh polis berhubung bahan sayuran yang disyaki kanabis. Bahkan apa yang dijumpai oleh ahli kimia dalam botol bertanda 6F-21 adalah 'CECAIR DISYAKI BAHAN ASID'. Tiada penjelasan oleh pendakwaan tentang

bagaimana 'CECAIR DISYAKI BAHAN ASID' boleh didapati sebagai kanabis. Perayu memohon agar Mahkamah Rayuan mengetepikan sabitan perayu berhubung pertuduhan kelima.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tiada rayuan terhadap sabitan berhubung pertuduhan kelima. Untuk membenarkan permohonan tersebut adalah seperti menetapkan prasyarat yang berbahaya. Ia bakal membuka jalan untuk permohonan sama di masa hadapan di mana perayu boleh sahaja menyerang secara kolateral keputusan hakim perbicaraan tanpa perlu melalui proses rayuan yang ditetapkan. Walaupun mahkamah mempunyai bidang kuasa untuk membuat perintah yang dipohon, ini bukan kes yang sesuai dan wajar untuk melaksanakan kuasa budi bicara. Tambahan pula ia tidak adil untuk pendakwaan kerana TPR yang bijaksana terkejut kerana beliau hanya menyedari tentang perkara itu pada tarikh perbicaraan itu (lihat perenggan 14–15).

(2) Apabila kes prima facie pengedaran didapati telah dibuktikan terhadap tertuduh, tertuduh menanggung beban berikut: Jika andaian pengedaran di bawah s 37(da) ADB terpakai terhadapnya dia mempunyai beban sah untuk membuktikan atas imbangan kebarangkalian bahawa dadah itu bukan bagi tujuan pengedaran. Jika andaian pengedaran tidak terpakai tetapi terdapat inferens yang boleh dibuat bahawa dadah itu adalah bagi tujuan pengedaran, dia masih mempunyai beban untuk dilepaskan tetapi beban itu adalah beban keterangan yang lebih rendah untuk hanya menimbulkan keraguan munasabah dalam kes pendakwaan berhubung sama ada dadah itu adalah bagi tujuan pengedaran atau sebaliknya; *Mat v Public Prosecutor* [1963] MLJ 263 dirujuk (lihat perenggan 18).

(3) Di mana beban adalah untuk mematahkan andaian pengedaran, akibat penemuan bahawa andaian itu telah dipatahkan akan merupakan satu pembebasan manakala ketiadaan penemuan sedemikian akan mengakibatkan suatu sabitan; *Public Prosecutor v Yuvaraj* [1962] 2 MLJ 189 dirujuk (lihat perenggan 19).

(4) Pembelaan tiada pengetahuan yang dibangkitkan oleh perayu tertakluk kepada andaian di bawah s 37(d) ADB. Untuk berjaya, dia perlu melepaskan beban sah ini dengan membuktikan atas imbangan kebarangkalian bahawa dia tiada pengetahuan tentang dadah itu. Andaian jelas terpakai kerana dadah itu ditemui dalam jagaan perayu dan di bawah kawalannya. Dia dengan itu dianggap mengetahui sifat dadah tersebut (lihat perenggan 24).

(5) Ia adalah kewajipan mahkamah untuk menggunakan dan memberi kesan kepada andaian di bawah s 37(d) ADB walaupun terdapat keterangan yang boleh dibuat inferens berhubung pengetahuan.

Parlimen menganggap ia sesuai untuk mengandaikan pengetahuan jika jagaan atau kawalan apa-apa dadah berbahaya dibuktikan. Untuk meninggalkan penggunaan andaian adalah seperti mengabaikan niat badan perundangan; *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 dirujuk (lihat perenggan 26).

(6) Dua andaian tersebut terpakai secara berasingan antara satu sama lain kerana ia berkaitan dengan elemen-elemen kesalahan yang berbeza. Apa yang diandaikan oleh s 37(da) ialah elemen pengedaran manakala s 37(d) mengandaikan elemen pengetahuan. Di mana andaian pengedaran disebabkan keterangan milikan, andaian pengetahuan disebabkan bukti jagaan atau kawalan. Sama ada 'pengedaran' diandaikan oleh s 37(da) atau dirumuskan dengan rujukan kepada s 2 ADB andaian pengetahuan di bawah s 37(d) masih boleh terpakai. Mana-mana pun beban membuktikan pembelaan tiada pengetahuan (jika dibangkitkan) masih terletak pada tertuduh (lihat perenggan 28–29).

(7) Hakim dengan wajar menolak tuntutan perayu bahawa dia tiada pengetahuan tentang dadah itu (lihat perenggan 34).

(8) Rukun terhadap andaian berganda seperti diputuskan oleh kes *Muhammed bin Hassan* telah dibatalkan oleh andaian kepada ADB dalam bentuk s 37A(1) yang berkuat kuasa pada 15 Februari 2014 melalui Akta Pindaan A1457. Dengan pindaan ini, andaian pengetahuan di bawah s 37(d) sekarang boleh digunakan untuk mengandaikan pengedaran di bawah s 37(da). Pindaan itu bagaimanapun tidak menjejaskan bahagian keputusan dalam kes *Muhammed bin Hassan* yang telah diputuskan bahawa mahkamah hendaklah menggunakan andaian pengetahuan di bawah s 37(d) sehingga jagaan atau kawalan dibuktikan (lihat perenggan 42–43).]

Notes

For cases on appeal in general, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 170–943.

For cases on drug trafficking, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 2620–2638.

For cases on s 39B(2), see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 665–681.

Cases referred to

Mat v PP [1963] MLJ 263; [1963] 1 LNS 82 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ng Eng Kooi & Anor v PP [1970] 1 MLJ 267, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)

Legislation referred to

Criminal Procedure Code s 180(4)
Dangerous Drugs Act 1952 s 2, 12(2), 37A(1), 37(d), 37(da), 39B(2)
Penal Code s 34

Appeal from: Criminal Trial No 45–92 of 2008 (High Court, Pulau Pinang)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Muhamad Yasser bin Mohd Nasri (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA:

[1] In the High Court the appellant together with two others were charged with five offences of trafficking in dangerous drugs under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA') read with s 34 of the Penal Code. He was found guilty of the first and fifth charges. For the first charge he was sentenced to death and for the fifth charge he was sentenced to seven years and ten strokes of the *rotan* after the charge was amended by the learned trial judge to an offence of possession under s 12(2) of the DDA. His appeal against conviction and sentence in respect of the first charge was dismissed by the Court of Appeal on 23 January 2013. He did not file any appeal against his conviction and sentence in respect of the fifth charge.

[2] As for the second, third and fourth charges they were all acquitted and discharged of the trafficking charges at the close of the prosecution case without their defence being called. The learned trial judge found that the prosecution failed to establish a prima facie case against any of them. The public prosecutor appealed to the Court of Appeal against the order of acquittal but only against the acquittal of the appellant and not against the acquittal of the other two accused. The appeal was successful whereupon the appellant was ordered to enter his defence on the original trafficking charges.

[3] When the case came up for resumption of hearing in the High Court, the learned trial judge found it necessary to amend the charges by taking out s 34 of the Penal Code (common intention) from the charges presumably because the acquittal of the other two accused had rendered the element of common intention otiose. For convenience we shall refer to the three amended charges (second, third and fourth charges in the court below) as the first, second and third charges. They read as follows:

First Charge

Bahawa kamu pada 18.6.2008 jam lebih kurang 10.30 malam, bertempat di alamat 260D, Leboh Carnarvon, Georgetown, di dalam Daerah Timur Laut, di dalam negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu

Methamphetamine seberat 43.23 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Second Charge

Bahawa kamu pada 18.6.2008 jam lebih kurang 10.30 malam, bertempat di alamat 260D, Leboh Carnarvon, Georgetown, di dalam Daerah Timur Laut, di dalam negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu Ketamine seberat 48.57 gram, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Third Charge

Bahawa kamu pada 18.6.2008 jam lebih kurang 10.30 malam, bertempat di alamat 260D, Leboh Carnarvon, Georgetown, di dalam Daerah Timur Laut, di dalam negeri Pulau Pinang, telah memperedarkan dadah berbahaya sejumlah berat 7.42 gram (Heroin seberat 6.21 gram) dan Monoacetylmorphines seberat 1.21 gram), dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[4] By ordering for the defence to be called, it must be taken that the Court of Appeal had found as a matter of law that a prima facie case of trafficking had been established against the appellant in respect of all three charges. Thus the issue of whether a prima facie case of trafficking had been established by the prosecution does not arise in this appeal. Any attack on any infirmity in the prosecution's evidence must in the circumstances be considered in this light. In any event this court being a court of co-ordinate jurisdiction has no jurisdiction to reverse the earlier decision of the Court of Appeal. Only the Federal Court can revisit the issue of prima facie case in the event of an appeal.

[5] As for the facts of the case, the evidence for the prosecution is as follows. On 18 June 2008 at about 10.30pm the complainant Chief Inspector Lim Wei Yih ('SP3') led a police party to raid house number 260D, Leboh Carnarvon, Georgetown Penang after receiving a tip off that drug related activities were taking place at the house.

[6] On their arrival at the house, SP3 saw the appellant standing in front of the house. When SP3 introduced himself as a policeman the appellant ran into the house through the side door and quickly locked the door. SP3 and three of his men had to kick the door open to enter the house. As the raiding party entered the house, the appellant ran towards the rear of the house but was caught by SP3 with the help of another officer. At the same time the two other accused were also arrested by other members of the raiding party. They were trying to open the back door when they were apprehended.

[7] A body check on the appellant led to the discovery of a bunch of keys from his right trousers pocket. Using one of the keys, SP3 opened the wooden door of the living room. When the door was opened, there was a staircase leading to the first floor of the house. SP3 walked up the stairs and as he reached the first floor, there was a corridor leading to two other rooms. The door to the first room was locked using a padlock. SP3 opened the padlock using another key from the same bunch of keys and entered the room. Inside the room SP3 found several containers containing substances suspected to be drug. SP3 then locked the room while waiting for the investigating officer ('IO') to arrive.

[8] After the arrival of the IO the exhibits including the drug exhibits were marked by SP3 and brought to the district police headquarters together with the three arrestees. The drug exhibits were later sent to the chemist for analysis and were confirmed to contain morphine weighing 59.39g, methamphetamine weighing 43.23g, ketamine weighing 48.57g, a mixture of heroin and monoacetylmorphines (6.21g of heroin and 1.21g of monoacetylmorphines) and cannabis weighing 53.17g. Except for the cannabis weighing 53.17g, these are the drug exhibits that formed the subject matter of the three charges against the appellant.

[9] Based on the equipment, the utensils and the substances found in the house, the chemist (SP1) was of the opinion that the house was being used as a clandestine drug processing laboratory ('makmal haram bagi memproses dadah'). This activity falls within the definition of trafficking under s 2 of the DDA. An inference can thus be drawn that the drugs were meant for that purpose.

[10] When called upon to state his defence the appellant chose to give evidence under oath. After hearing his explanation as supported by the testimony of his wife ('SD2') the learned trial judge found him guilty and sentenced him to death for each of the three charges. This is his appeal against the conviction and sentence.

[11] Before us Tuan Hj Hisham Teh Poh Teik, who was not counsel acting for the appellant at the High Court raised two issues, firstly a doubt on the identity of the exhibits and secondly failure by the learned trial judge to draw inferences favourable to the appellant. We shall deal with the first issue first. The argument is premised on counsel's contention that the appellant might have been wrongfully convicted of the fifth charge in respect of which neither the appellant nor the public prosecutor filed any appeal. The fifth charge was as follows:

> Bahawa kamu bersama-sama pada 18.6.2008 jam lebih kurang 10.30 malam, bertempat di alamat 260D, Leboh Carnarvon, Georgetown, di dalam Daerah Timur Laut, di dalam negeri Pulau Pinang, dengan niat bersama memiliki dadah

berbahaya jenis Cannabis seberat 53.17 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

[12] It was submitted that the charge was baseless as there was no evidence of any seizure by the police of vegetable material suspected to be cannabis. In fact what the chemist found in the bottle marked 6F-21 was 'CECAIR DISYAKI BAHAN ASID'. Both the search list and the police report also did not mention any recovery or seizure of vegetable material. There was no explanation by the prosecution as to how the 'CECAIR DISYAKI BAHAN ASID' came to be found to be cannabis.

[13] It was contended that this infirmity in the prosecution case has thrown doubts on the integrity of the chemist evidence and the appellant could have been convicted of an offence which he did not commit. The analogy is that since it was the same chemist who analysed the drugs confiscated from the premises, there could also be a doubt on the identity of the drug exhibits produced in the present case under appeal. We understand this to mean that since the manner in which the evidence that was built up in respect of the fifth charge is questionable, the integrity of the exhibits in the present case under appeal must also be questionable. It was urged upon us to exercise our inherent jurisdiction to set aside the appellant's conviction on the fifth charge.

[14] Without delving into the merits of the submission, we declined to accede to learned counsel's request firstly because there was no appeal against the conviction in respect of the fifth charge and secondly to allow such application would be to set a dangerous precedent. It will potentially open the floodgates for similar application in the future whereby an appellant could just collaterally attack the trial judge's decision without going through the prescribed appeal process.

[15] Thus, although we were seized with jurisdiction to make the order sought, we did not find this to be a fit and proper case for the exercise of such discretionary power. Furthermore it was unfair to the prosecution as the learned DPP was taken by surprise as he was only made aware of the matter on the hearing date itself.

[16] This brings us to the second issue, which is whether the learned trial judge failed to draw inferences favourable to the appellant. It was submitted that the learned trial judge was wrong in drawing the inference that the premise was used for manufacturing and that the appellant was engaged in processing drugs. It was pointed out that the learned trial judge had fallen into serious error in making such finding as it contradicted his own finding in his earlier

judgment that the appellant was not engaged in the act of processing or manufacturing.

[17] With due respect to learned counsel, the point raised is a non-issue as the learned trial judge's finding in his earlier judgment had by necessary implication been set aside by the Court of Appeal when it allowed the public prosecutor's appeal. The only issue before us is whether the learned trial judge had erred in finding the appellant guilty of the offences charged.

[18] The position of the law as we understand it is that when a prima facie case of trafficking has been found to have been established against the accused either by the trial court or by the appellate court on appeal, the accused bears the following burden: If the presumption of trafficking under s 37(da) of the DDA applies against him he has a legal burden to prove on the balance of probabilities that the drugs were not for the purpose of trafficking. If the presumption of trafficking does not apply but nevertheless an inference can be drawn that the drugs were for the purpose of trafficking, he still has a burden to discharge but the burden is the lower evidential burden of merely to cast a reasonable doubt in the prosecution case as to whether the drugs were for the purpose of trafficking or otherwise: *Mat v Public Prosecutor* [1963] MLJ 263; [1963] 1 LNS 82.

[19] Where the burden is to rebut the presumption of trafficking, the consequence of a finding that the presumption has been rebutted will be an acquittal whereas the absence of such a finding will have the consequence of a conviction: see the Privy Council decision in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116 where Lord Diplock said:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. *In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction.* (Emphasis added.)

[20] The above passage was quoted with approval by the Federal Court in *Ng Eng Kooi & Anor v Public Prosecutor* [1970] 1 MLJ 267. We are mindful of the fact that *Yuvaraj* was a corruption case while *Ng Eng Kooi* was a customs case and as such may not be analogous to drug trafficking cases but in our view the above pronouncement by Lord Diplock equally applies to drug trafficking cases as both judgments turned on the words 'unless the contrary is proved'. These words bear the same meaning as the words 'until the contrary is proved'

found in s 37(da) of the DDA.

[21] It was with these principles in mind that we proceeded to carefully consider the learned trial judge's evaluation of the appellant's defence. Having done so we were satisfied that the learned judge had not erred in finding the appellant guilty of the offences charged. We were satisfied that there had been sufficient judicial appreciation of the evidence by the learned trial judge. In our view, any reasonable tribunal properly appraised of the facts and the principles would have arrived at the same conclusion as the learned trial judge did.

[22] Having said that we need to point out an important feature of the case. When the Court of Appeal ordered the appellant to enter his defence, the order was for him to enter his defence on three trafficking charges. He was not called upon to answer three possession charges. However, when the appellant entered his defence, the defence that he raised was the defence of no knowledge, ie that he was not even in 'possession' of the drugs as the word is understood in criminal law. Clearly trafficking and possession are two distinct offences under the DDA.

[23] The defence of no knowledge raised by the appellant is a complete defence in the sense that if established it would not only entitle him to be acquitted of the trafficking charges but will also exculpate him of the offence of possession under s 12(2) of the DDA for without knowledge possession is not an offence. But by adopting this line of defence the appellant had chosen not to give any explanation to the chemist's testimony that the house was used as a clandestine drug processing laboratory. This must be taken to mean that the appellant had no answer to the inference drawn that the drugs were for the purpose of trafficking within the meaning of s 2 of the DDA.

[24] The defence of no knowledge raised by the appellant is subject to the presumption under s 37(d) of the DDA. In order to succeed he must discharge this legal burden by proving on the balance of probabilities that he had no knowledge of the drugs. The presumption clearly applied as the drugs were found in the appellant's custody and under his control. He is therefore deemed to have known the nature of the drugs. For ease of reference we reproduce below s 37(d):

> In all proceedings under this Act or any regulation thereunder —
>
> (d) any person who is found to have in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be *deemed to have been in possession* of such drug and shall, until the contrary is proved, be *deemed to have known the nature* of such drug. (emphasis ours)

[25] It is to be noted that there are two limbs to the provision, the first being a presumption of 'possession' and the other a presumption of knowledge as to the nature of the drug. It is the second limb that we are concerned with. By the terms of the second limb, knowledge is presumed to exist 'until the contrary is proved', which means until and unless the accused discharges his burden of proof, the court must act on the basis that he knew about the drug. Thus, to entitle the appellant to the benefit of the defence it is not enough for the appellant to merely raise a reasonable doubt as to whether he had knowledge of the drugs or otherwise. The law required him to prove to the contrary. He must as a matter of law prove to the contrary on the balance of probabilities. The presumption does not cease to operate just because there is affirmative evidence of knowledge against him and thus entitling him to take advantage of the lower burden of merely raising a reasonable doubt in the prosecution case instead of the higher burden of proving his defence on the balance of probabilities.

[26] It is the duty of the court to invoke and give effect to the presumption under s 37(d) of the DDA even where there is evidence from which to draw the inference of knowledge. Parliament in its wisdom has deemed it fit to presume knowledge once custody or control of any dangerous drug has been established. To omit invoking the presumption would be to ignore the intention of the Legislature. It will give the impression that Parliament had legislated in vain, which it does not. The court's obligation to invoke the presumption was emphasized by the Federal Court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 where Chong Siew Fai CJ (Sabah and Sarawak) delivering the judgment of the court said at p 287 (MLJ); p 190 (CLJ):

> The 'deemed' state of affairs in s 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under s 37(d) (and for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that *upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves to the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make*. (Emphasis added.)

[27] The decision in the above case which binds this court and the court below was followed in the Federal Court case of *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121. It is important to appreciate the distinction between the legal burden to prove a defence on the balance of probabilities and the evidential burden to merely cast a reasonable doubt in the prosecution case. To apply the wrong burden either way can give rise to a serious miscarriage of justice.

[28] The decision in *Muhammed bin Hassan* must not be understood to mean that where there is affirmative evidence of possession to invoke the presumption of trafficking under s 37(da), the prosecution is barred from invoking the presumption of knowledge under s 37(d). These two presumptions apply independently of each other as they relate to different elements of the offence. What is presumed by s 37(da) is the element of trafficking whereas s 37(d) presumes the element of knowledge. While the presumption of trafficking is triggered by evidence of possession, the presumption of knowledge kicks in by proof of custody or control.

[29] Thus whether 'trafficking' is presumed by s 37(da) or inferred by reference to s 2 of the DDA the presumption of knowledge under s 37(d) remains applicable. Either way the burden of proving the defence of no knowledge (if raised) remains with the accused.

[30] In the present case the learned trial judge applied the reasonable doubt test throughout in dealing with the appellant's defence of no knowledge. This is erroneous but since the misdirection was favourable to the appellant it has no bearing on the outcome of the case. If the appellant could not succeed on the lower burden, there is no question that he could succeed on a higher burden.

[31] We should perhaps quote what Azmi LP delivering the judgment of the Federal Court in *Ng Eng Kooi* had to say on this distinction in law:

> It was next submitted by Dato' Marshall that the quantum of proof indicated by their Lordships of the Privy Council is incongruous in that it gives a higher status to a presumption of law than to actual facts. By way of example, he said that if the police search a person and find with him a tobacco pouch with tobacco in it, they can charge him for being in possession of uncustomed goods and the onus is on him under s 131(2) of the Ordinance to prove on the balance of probabilities that duty has been paid on the tobacco or that he does not know that duty has not been paid, whereas if a person is charged with far graver crimes such as treason, murder or fraud, all that he has to do is to raise a reasonable doubt in the prosecution case. He further said that the said quantum of proof has now introduced in this country two different measures of quantum of proof on an accused person at the close of the prosecution case, which if unrebutted, must result in a conviction, namely:
>
> (a) to raise a reasonable doubt where the prosecution case is made out of facts and legitimate inferences therefrom; and
>
> (b) to prove on a balance of probabilities where a statutory presumption is raised against him 'unless the contrary is proved'.
>
> This distinction in the quantum of proof, he submitted, seems to be contrary to elementary commonsense and unnecessary.
>
> With great respect to Dato' Marshall, that distinction in the quantum of proof has

always been there, and law is not always or solely a matter of elementary common sense.

[32] And in answer to Dato' Marshall's suggestion in the same case that to follow the test laid down by *Yuvaraj* would cast on the defence a heavier burden than having to merely raise a reasonable doubt in the prosecution case, Azmi LP reproduced what Lord Diplock said at p 92 as follows:

> It has been suggested that to satisfy the court that upon the balance of probabilities a fact does not exist puts too high a burden upon a defendant in criminal proceedings where the consequences of a failure to disprove that fact would be his conviction; and in some of the cases cited by the Federal Court without explicit disapproval expressions are used which might be understood as calling for an explanation by the defendant of no greater plausibility than is sufficient to raise a reasonable doubt in the existence of the fact which he must disprove. But this is the test by which in the absence of any statutory provision reversing the burden of proof the court determines whether a fact the existence of which is a necessary ingredient of a criminal offence has been 'proved' or 'not proved' by the prosecution upon whom the onus lies to prove it. It is merely another way of saying that the prosecution must not only prove the first two factual ingredients of the offence, viz (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift, or receipt he was in the employment of the public body, but must also satisfy the court that the circumstances in which the gratification was paid, given or received give rise beyond reasonable doubt to an inference of fact that it was paid, given or received with a corrupt motive. This is the ordinary way in which the prosecution satisfies the burden of proving the motive with which an act was done by the defendant where the onus of doing so lies upon the prosecution. *In Their Lordships' view it gives no sufficient effect to the reversal of the ordinary onus of proof by an express statutory provision that a fact which constitutes an ingredient of a criminal offence shall be deemed to exist 'unless the contrary is proved'*. (Emphasis added.)

[33] Thus, where the accused has a legal (and not merely evidential) burden to discharge, he does not discharge that burden by merely raising a reasonable doubt on the fact that is presumed by law, in this case knowledge of the nature of the drugs. He must prove absence of knowledge on the balance of probabilities by admissible evidence. In the absence of such rebuttal evidence coming from the accused, there will be no material before the court for the trial judge to come to a finding that the fact presumed has been rebutted.

[34] The question therefore is whether the appellant had rebutted the presumption of knowledge under s 37(d) of the DDA. A careful examination of his defence will reveal that it is a mere denial more than anything else. The learned trial judge had clearly and in our view rightly rejected the appellant's claim that he had no knowledge of the drugs. His explanation was obviously tailored to counter every material aspect of the prosecution's evidence. When

A the prosecution's evidence was that he ran away when SP3 confronted him, he said this was a lie. The truth according to him is that it was the police themselves who brought him into the house through the side door. When the prosecution's evidence was that he locked the door after running into the house, he said the door was not locked. He denied SP3's evidence that the B police had to kick open the door. He went on to say that the police only identified themselves after his arrest and not before.

[35] When the prosecution evidence was that he was present when the drugs and drug related utensils were discovered in the house, the appellant countered C by saying that he was not present. He also refuted SP3's evidence that a bunch of keys was found inside his right trousers pocket. According to him the keys were found on a table in one of the rooms inside the house. It appears that about the only thing he did not dispute is the fact that he was not wearing any shirt. D

[36] He testified that after the police took the keys he could not remember what happened. The only thing he could remember according to him was being handcuffed. Nevertheless, despite this sudden loss of memory the E appellant went on to say that he was then brought to the kitchen where he saw the other two accused being detained.

[37] The rest of his evidence was intended to give the impression that the drugs seized were already in the house before he rented it from one Neoh F Thiam Chuan and that he had no knowledge of the drugs, nor did he know who put the drugs there or how long the drugs had been there. These are questions for the trial court to consider whether to accept or to reject. As for his wife's (SD2) testimony, the only material part of her evidence if at all is that she had seen five to six people in the house. However she did not know any of them. G

[38] On the issue of knowledge, we bear in mind that the Court of Appeal, in finding that a prima facie case of trafficking had been established against the appellant must have found that the witnesses called by the prosecution were credible witnesses. This can only mean that knowledge had been proved against H the appellant as their evidence, in particular SP3's evidence point to guilty conduct on the part of the appellant. We can safely say that the Court of Appeal would not have called for the defence if there was a doubt on the credibility of the prosecution witnesses. More importantly as discussed earlier it is not for the prosecution to prove knowledge as it is presumed. I

[39] As a matter of fact the acquittal of the appellant by the High Court was not because the learned trial judge did not believe the prosecution witnesses. His initial decision to acquit the appellant of the trafficking charges was based on an entirely different ground, ie that there was no evidence that the appellant

was involved in manufacturing and processing drug. Indeed at p 112 of the judgment (p 135 of the record of appeal Vol 1) the learned trial judge made it clear that he accepted the evidence of SP3 and SP7 as being credible and reliable.

[40] Since the appellant's defence of no knowledge (which is purely a question of fact) was rejected by the learned trial judge, albeit on the lower burden of raising a reasonable doubt, it must follow that the trafficking charges had been proved beyond reasonable doubt. Failure to rebut the presumption of knowledge must lead to a conviction as it left the appellant with no other defence to fall back on in rebuttal of the prima facie case of trafficking established against him at the close of the prosecution case.

[41] In this regard what s 180(4) of the Criminal Procedure Code provides gives some idea as to what the accused is required to do when his defence is called:

> For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which *if unrebutted or unexplained* would warrant a conviction. (Emphasis added.)

[42] As a postscript we need to mention that the rule against double presumption as decided by *Muhammed bin Hassan* has been overruled by an amendment to the DDA in the form of s 37A(1) which took effect on 15 February 2014 vide Amendment Act A1457. It provides as follows:

> 37A Application of presumptions
>
> (1) Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law.

[43] With this amendment, the presumption of knowledge under s 37(d) can now be invoked to presume trafficking under s 37(da). The amendment however does not affect that part of the decision in *Muhammed bin Hassan* which decided that the court must invoke the presumption of knowledge under s 37(d) once custody or control is established.

[44] For reasons aforesaid we found no merit in the appellant's appeal and we therefore dismissed the appeal and affirmed the conviction and sentence.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum